BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENTS ON BEHALF OF STUDENT,<br><br>v.<br><br>BELLFLOWER UNIFIED SCHOOL DISTRICT. | OAH Case No. 2018071234 |

# DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on July 30, 2018, naming Bellflower Unified School District, as respondent. The matter was continued for good cause on September 17, 2018.

Administrative Law Judge Christine Arden heard this matter in Bellflower, California, on November 13, 27, 28 and 29, 2018.

Tania Whiteleather, Attorney at Law, represented Student. Mother attended the hearing on Student's behalf and testified. Student did not attend the hearing. The hearing was interpreted into Spanish.[1]

Eric Bathen, Attorney at Law, represented Bellflower on November 13, 2018. Marsha Brady, Attorney at Law, represented Bellflower on November 27, 28, and 29,

[1] On November 13, 2018, the interpreter was Rose Carrasco. On November 27, 28 and 29, 2018, the interpreter was Angelica Figueroa.



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2018. Matthew Adair, Program Administrator, attended the hearing on behalf of Bellflower and testified.

Following conclusion of the testimony, the ALJ granted a continuance until January 3, 2019, at the parties' request to file written closing arguments. Upon timely filing of the closing briefs, the record was closed and the matter was submitted for decision on January 3, 2019.

## ISSUES

1. Did Bellflower deny Student a free appropriate public education after November 20, 2017 by failing to conduct the educational assessments ordered for Student in the November 20, 2017 OAH Decision in case number 2017050338 for Student's 2015 triennial assessments?[2]

2. Did Bellflower deny Student a FAPE by failing to timely and appropriately respond to Student's June 18, 2018 central auditory processing and transition assessment requests?

3. Did Bellflower deny Student a FAPE by failing to timely offer Student a FAPE for the 2018-2019 school year?

## SUMMARY OF DECISION

Student, who was eligible for special education, resided in Bellflower, and was parentally placed at a private school located within the Norwalk-LaMirada Unified School District, prevailed on all three issues. Bellflower denied Student a FAPE by failing to conduct four independent educational assessments ordered in a prior OAH decision.

[2] Issue number one is as stated in a written stipulation of the parties submitted to the ALJ on November 27, 2018, before any witnesses testified at the hearing.



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Bellflower also denied Student a FAPE by failing to appropriately respond to Parents' request for assessments in the areas of central auditory processing and transition when it informed Parents it would not conduct such assessments. Bellflower further denied Student a FAPE by failing to offer Student a FAPE for the 2018-2019 school year, despite Parents' request that Bellflower offer Student a FAPE. Student was awarded compensatory education, independent educational evaluations, and reimbursement for private school tuition, and the cost of round trip transportation between home and school.

## FACTUAL FINDINGS

1. Student is a 17-year-old female in the eleventh grade, who resided with her Parents within the geographic boundaries of Bellflower at all relevant times.

2. Student was first found eligible for special education when she was three years old due to her speech deficits. Her speech improved and she was exited from special education eligibility when she was about four and a half years old. Student continued to struggle in school. Mother again requested evaluations of Student when she was in fifth grade. Bellflower assessed Student and found her eligible for special education on November 8, 2012, under the primary category of autism and secondary category of speech or language impairment.

3. Student did not return to Bellflower for the 2014-2015 school year. Instead, Parents unilaterally placed Student for the 2014-2015 school year at New Harvest Christian School, a small private school located within the geographic boundaries of the Norwalk-LaMirada Unified School District. Student continued to attend New Harvest through the hearing in this case.

4. Bellflower and Norwalk-LaMirada are members of the Greater Los Angeles Area Special Education Local Plan Areas (GLASS). GLASS is an organization consisting of 18 special education local plan areas in Los Angeles county. Bellflower and Norwalk-



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LaMirada, as members of GLASS, are parties to the Greater Los Angeles Area SELPAs' Private School Agreement dated May 30, 2014 (the GLASS Agreement). The GLASS Agreement addresses the obligations of its member public school districts with regard to students with disabilities, who were parentally placed at private schools. The GLASS Agreement gives guidance to districts when students are privately placed in private schools located in public school districts, other than where the students reside.

5. In May, 2015, Parents requested Bellflower make an offer of FAPE for Student for the 2015-2016 school year. Bellflower refused, stating it would make an offer of FAPE to Student if she reenrolled in Bellflower.

6. Bellflower declined Parents' requests to assess Student and offer her a FAPE based on the terms of the GLASS Agreement. Special Education Administrator, Matthew Adair, opined that, under the GLASS Agreement, Bellflower, as Student's district of residence, was not responsible for assessing Student, holding an IEP team meeting, or making an offer of FAPE, until Student reenrolled in Bellflower, or indicated a desire to reenroll. The GLASS Agreement defined the district where a student resides as the district of residence, and the district where the private school is located as the district of location. It directed the district of residence to refer the Student to the district of location for assessments, and directed the district of location to assess students and offer them individual service plans. The GLASS Agreement also directed the district of residence to hold an IEP team meeting and provide an offer of FAPE if at any time the parent indicates she preferred her child to attend public school.

7. Tracy McSparren, Bellflower superintendent of schools since July, 2018, testified at hearing. Before being superintendent and interim superintendent, she served as assistant superintendent for special education and student support from 2016 through January 2018. In that position, Ms. McSparren oversaw Bellflower's special education programs and administrative staff.



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8. Ms. McSparren opined Bellflower would make an offer of FAPE to Student only if Parents enrolled her and established residency within the district. In reliance on the GLASS Agreement, she opined that if Parents wanted Student to be assessed they should have requested the assessments from Norwalk-LaMirada because Student attended a private school within its geographic boundaries. Ms. McSparren also opined that if Norwalk-LaMirada held an individual service plan meeting for Student, and Bellflower was invited, Bellflower would have sent a representative to attend. Any subsequent offer of FAPE from Bellflower would have been based on the information about Student shared at that individual service plan meeting. Her testimony was inconsistent with the term in the GLASS Agreement which provided that the district of residence should hold an IEP team meeting and provide an offer of FAPE if at any time a parent indicates she preferred her child to attend public school.

9. On September 6, 2016, Parents requested that Bellflower hold an IEP meeting and convey an offer of FAPE for Student for the 2016-2017 school year. On September 14, 2016, Bellflower informed Parents it would not hold an IEP meeting or make an offer of FAPE until Student reenrolled in Bellflower. This is the same way Bellflower had previously responded to Parents' requests for an IEP and offer of FAPE in 2015, and in early 2016. Bellflower, relying on the GLASS Agreement, asserted it was not responsible for assessing Student, holding an IEP meeting, or making an offer of a FAPE until Student reenrolled in Bellflower. Bellflower told Parents to ask Norwalk-LaMirada to assess Student.

10. In compliance with an order from the California Department of Education, Bellflower held an IEP meeting for Student on February 15, 2017. Mother and her advocate, Christopher Russel, attended the meeting. Bellflower's offer of FAPE was based on Student's June 3, 2014 IEP, which Parents had rejected. The team gave Mother a "prospective" assessment plan, which Mother signed and returned to the team at the



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meeting. The assessment plan identified assessments Bellflower would conduct if Student reenrolled in Bellflower. The team reminded Mother that Bellflower would not begin assessing Student until she was enrolled in and attending school within the district.

11. Mr. Russel complained at the February 15, 2017 meeting that Bellflower's offer of FAPE was based on outdated information.

12. Because Bellflower failed to assess Student and denied Parents the opportunity to meaningfully participate in an IEP team meeting, Parents kept Student enrolled at New Harvest.

13. A round trip from Student's home to New Harvest and back is 9.58 miles long.

14. Parent's filed OAH case number 2017050338 on May 5, 2017. A hearing was held before Administrative Law Judge Linda Johnson on September 26 and 27, 2017. The undersigned ALJ in this case took official notice of the Decision in OAH case number 2017050338, pursuant to Gov. Code, § 11515. Certain factual findings, a legal conclusion and orders made in the Decision in OAH case number 2017050338 (designated as Factual Findings, paragraphs 12, 13, 15, 18, 19 and 24; Legal Conclusion, paragraph 29; and Orders 1 through 4) are incorporated into this Decision.

15. OAH issued a Decision in OAH case number 2017050338 on November 20, 2017. Bellflower was ordered to reimburse Parents for Student's private school tuition and mandatory fees from September 2015 through June 2017, and for one 9.58 mile round trip from home to school for every day Student attended school in the 2015-2016 and 2016-2017 regular school years at a rate of 53.5 cents per mile. Bellflower was ordered to pay Parents within 45 days of the order, and immediately fund independent educational evaluations for Student in the areas of psychoeducation; speech and language; occupational therapy; and behavior. Bellflower was also ordered to continue



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to reimburse Parents for private school tuition and mandatory fees and transportation through the 2017-2018 school year, or until Bellflower held an IEP and made an offer of FAPE to Student, whichever occurred first.

16. Bellflower appealed OAH case number 2017050338 before the United States District Court, Central District of California, on January 3, 2018. The appeal was pending at the time of hearing in the instant case.

17. Bellflower did not timely comply with the orders in OAH case number 2017050338, based on its position that it was not required to do so while the appeal was pending. On January 2, 2018, the California Department of Education issued a notice of corrective action requiring Bellflower to reimburse Parents the New Harvest tuition as ordered in OAH case number 2017050338. Bellflower did not comply with the California Department of Education's notice of corrective action.

18. The last day of Bellflower's 2017-2018 school year was June 14, 2018. On June 18, 2018, Parents wrote to Bellflower complaining it had still not conducted the assessments ordered in OAH case number 2017050338. Parents gave notice they planned to obtain an independent speech and language assessment and seek reimbursement for it from Bellflower. They also requested Bellflower assess Student in the areas of central auditory processing, and transition. Lastly, Parents stated they still wanted Bellflower to make an offer of a FAPE for Student.

19. Mr. Adair timely responded to Parents' requests by writing a letter to Mother on June 29, 2018. He gave prior written notice that Bellflower declined to reimburse Parents for an independent speech and language assessment because Bellflower had a pending appeal. The prior written notice also informed Parents that Bellflower refused to conduct both the central auditory processing and transition assessments Parents had requested. Mr. Adair did not expressly explain why Bellflower would not conduct those assessments. However, Bellflower's prior written notice further



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informed Parents that, as a student enrolled in a private school located within the Norwalk-LaMirada district, Student might be entitled to receive the requested assessments from Norwalk-La Mirada. The notice went further and stated that until such time that Parents indicated a desire to enroll Student in Bellflower, Norwalk-LaMirada was the appropriate local educational agency to assess Student. In his June 29, 2018 letter Mr. Adair did not mention the GLASS Agreement as authority for Bellflower's refusal to assess Student. Mr. Adair recommended Mother contact Norwalk-LaMirada. Mr. Adair also informed Parents that if Mother wanted Student to receive an individualized services plan, and an offer of a FAPE from Bellflower, she should contact the special education department at Norwalk-La Mirada. Lastly, Mr. Adair informed Parents that if they indicated their desire to enroll Student in Bellflower and to receive an offer of a FAPE, Bellflower would make an offer of a FAPE to Student based on the information shared at an individual service plan meeting held by Norwalk-La Mirada.

20. As of July 30, 2018, the date Student filed her complaint in this matter, Bellflower had neither held Student's 2015 triennial IEP, nor even started, let alone completed, assessments of Student in preparation for that triennial IEP meeting as ordered in OAH case number 2017050338. Bellflower had not offered Student a FAPE for the 2018-2019 school year.

21. The Decision in OAH case number 2017050338 ordered Bellflower to immediately fund four independent educational evaluations of Student. Twenty-seven school weeks remained in the Bellflower 2017-2018 school year after November 20, 2017, the date the decision in OAH case number 2017050338 was issued. The first day of Bellflower's 2018-2019 school year was August 20, 2018. There were 15 weeks in the 2018-2019 school year from August 20, 2018 through November 29, 2018, the last day of hearing in this case.

22. On October 12, 2018, Mr. Adair transmitted a check from Bellflower to



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Parents in the amount of $11,761.15, for reimbursement of tuition and transportation costs. The amount of $9,137 constituted reimbursement for New Harvest tuition during the period from September 2015 through June 2017. The balance of the check was reimbursement for the cost of transporting Student to New Harvest during the 2015-2016 and 2016-2017 school years. At the time of hearing Bellflower had not yet reimbursed Parents for tuition or transportation costs for the 2017-2018 school year. Bellflower had also not reimbursed Parents for tuition or transportation costs for any portion of the 2018-2019 school year.

23. At hearing both Ms. McSparren and Mr. Adair testified Parents failed to establish residency within Bellflower's geographic boundaries. However, Bellflower never expressly requested that Parents provide proof of Student's residency. No mail sent from Bellflower to Student's address was returned as undeliverable. Also, Mother provided proof of residency to Bellflower when enrolling another child in the district. Ms. McSparren's and Mr. Adair's testimony implying Parents had not established residency in Bellflower lacked credibility, as the evidence indicated there was no reason to suspect Student's family did not live in Bellflower. Neither of them seemed sincere when testifying on this point.

24. Both Ms. McSparren and Mr. Adair testified that Parents were not interested in enrolling Student in Bellflower, based on Mother's prior testimony in OAH case number 2017050338. There was no evidence to corroborate Ms. McSparren and Mr. Adair's testimony. Mother denied ever stating that she was not interested in Student attending Bellflower. Mother's testimony was consistent with other evidence.

THE NEW HARVEST PROGRAM

25. Student continued to attend New Harvest through the 2018-2019 school year. As of the date of hearing Student was in the eleventh grade, and had attended New Harvest for over four years.



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26. New Harvest is a small Christian based school located in Norwalk that serves students from preschool through high school. The teachers at New Harvest do not hold California teaching credentials. New Harvest is not accredited by the California Department of Education as a nonpublic school. New Harvest is registered with the California Department of Education as a private school.

27. Ms. Cathy Garcia, New Harvest principal, testified credibly at hearing. She was very composed and spoke knowledgably about Student and the program at New Harvest. Her demeanor was very professional. She testified with candor and without hesitation. She responded to questions directly and her memory was very good. Ms. Garcia presented as a professional educational administrator, who was very committed to the well-being and success of the students attending New Harvest and to Student specifically. Ms. Garcia was very familiar with Student and her educational needs. For example, she stated that Student had gotten overwhelmed when presented with multiple tasks. In those instances, Student took a break, or if necessary, went to Ms. Garcia's office in order to regulate herself. Student was functioning two years behind grade level.

28. Ms. Garcia completed some junior college courses, but did not have a bachelor's degree. She had been the principal at New Harvest for the last ten years. Prior to that she was the vice principal at New Harvest for eight years. She did not have a California educational administrator credential or teaching credential. None of the teachers at New Harvest held California teaching credentials. Some, but not all, of New Harvest teachers had four-year college degrees.

29. With the exception of some elective classes, the New Harvest curriculum is entirely individualized. Students each work individually at his/her own pace on packets of lessons in sets of 12 in their core academic subjects. The educational materials used are published by Accelerated Christian Education, a national Christian educational



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publisher serving private religious schools like New Harvest. The group lecture format is not used in core courses. Help from staff is readily available, as is one-to-one tutoring when needed. New Harvest's curriculum is similar to a public school curriculum. New Harvest does not provide specialized academic instruction or related services, but it had provided accommodations to Student.

30. Excluding the single religious elective course that New Harvest requires for its students to earn a high school diploma, approximately 5% of the curriculum in the academic courses at New Harvest was religious content. Student had not yet taken the required religious elective course.

31. Student started making academic progress four to five months after she started attending New Harvest in seventh grade. Student positively responded to the individual attention from New Harvest staff. Although Student made significant academic progress in reading comprehension, math, writing, and memorizing strategies, she continued to struggle with learning. Ms. Garcia credibly opined that Student was doing well at New Harvest, although she was performing at a ninth grade academic level. Her success at New Harvest was primarily due to the one-to-one attention from teachers and aides. Student received effective tutoring in math from a teacher's assistant.

32. Student's target graduation date was June, 2020. She was working on completing the 220 credits required by the California Department of Education to receive a New Harvest high school diploma. The substance of the New Harvest curriculum followed the requirements of the California Department of Education. If Student does not complete her graduation requirements by June, 2020, she can continue to attend New Harvest until she does so.

33. New Harvest does not have a psychologist, counselor, or a special education department. Ms. Garcia had provided Student with counseling services. Ms.



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Garcia would love to see Student be able to receive psychological services.

34. Only some of the New Harvest elective courses are taught in a traditional lecture format in a group setting. Students take all core curriculum courses individually. Student had taken only core curriculum courses at New Harvest.

35. A New Harvest high school diploma is recognized by the California Department of Education. New Harvest is not accredited by an accrediting agency. Therefore, its diploma is not "accredited" and not acceptable for admission to the University of California and California State University systems. New Harvest students have been admitted to private colleges, out of state colleges, and community colleges.

36. Mother had been very proactive with regard to keeping track of whether Student's needs are being met at New Harvest. If Student's needs were not met at school, Mother brought it to Ms. Garcia's attention.

37. Some students at New Harvest have IEPs from their districts of residence. Ms. Garcia relies on these IEPs for recommendations about how to assist and accommodate those students. New Harvest refers students to their districts of residence for special education assistance if they are struggling. New Harvest students reside in a variety of public school districts. Some New Harvest students had IEPs from their districts of residence, including Bellflower.

38. Student improved academically and socially during her time at New Harvest. She was performing two years behind grade level in certain subjects. Student was a diligent worker. She had friends and participated in two extra-curricular activities. She tried hard and sometimes got overwhelmed by multiple tasks. Her confidence grew significantly during her time at New Harvest. Student received educational benefit at New Harvest since some, but not all, of Student's needs were met there.

39. Student attended school at New Harvest every school day in the 2018-2019 school year through November 28, 2018, which, based upon Ms. Garcia's



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testimony and attendance records, amounted to 56 days.

TESTIMONY OF MOTHER

40. Mother credibly testified at hearing. She relied on an interpreter when testifying, but she had good eye contact during her testimony, and she did not hesitate when answering questions. She responded to questions honestly and candidly.

41. Mother's primary language is Spanish. She speaks rudimentary English. Mother sometimes depended on her adult son and other bilingual individuals when communicating with Bellflower about Student.

42. Mother never told representatives of Bellflower that she would not allow Student to return to school at Bellflower. If Bellflower made an appropriate offer of a FAPE to Student which met her needs, Parents would have enrolled Student in Bellflower and she would have attended school there.

43. Mother and Student were happy with Student's performance at New Harvest because she has learned there. After attending New Harvest Student told Mother, "I am not dumb anymore." All of Student's needs were not met at New Harvest, even though she made progress. Student took algebra in the 2018-2019 school year, which Mother previously believed Student would never be able to handle. Her reading and writing skills improved. Mother opined that Student continued to need speech and language therapy services and help with processing things she hears and reads. Therefore, Student would benefit from an award of tutoring as compensatory education.

44. Parents acted reasonably by placing Student at New Harvest when Bellflower failed to assess and offer her a FAPE. They gave Bellflower written notice that they placed Student at New Harvest and would seek reimbursement for educationally related expenses from Bellflower.

45. Parents paid $435 per month for Student's tuition at New Harvest for the regular 2017-2018 school year. Parents also paid $435 per month for tuition each of



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three months (September, October and November, 2018) during the portion of the 2018-2019 school year through the dates of hearing. Parents also paid $800 for Student to attend summer school at New Harvest in 2018. Parents and Student's adult brother drove her to and from school. A round trip between Student's home and New Harvest was 9.58 miles.

46. No evidence was introduced regarding the Internal Revenue Service standardized mileage rate applicable for 2017 and 2018 for employee reimbursement or deduction on income tax returns.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[3]

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C.

[3] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.



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§ 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at p. 200, 203–204.)

4. In 2017, the United States Supreme Court unanimously declined to



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interpret the definition of FAPE in a manner at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'…" (*Endrew F. v. Douglas Sch. Dist. RE-1* (2017) 137 S.Ct. 988, 1000). The Supreme Court in *Endrew* stated that school districts must "… offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable a student to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student is the party petitioning for relief and has the burden of proving the essential elements of her claim with a preponderance of the evidence. (*Schaffer, supra,* 546 U.S. 49, at p. 62.)

ISSUE ONE: BELLFLOWER'S FAILURE TO ASSESS STUDENT AS ORDERED IN OAH CASE NUMBER 2017050338.

7. Student contends Bellflower denied her a FAPE after November 20, 2017, by failing to conduct the four independent educational evaluations it was ordered to conduct in OAH case number 2017050338. Student further contends she continued to be deprived of her 2015 triennial assessments and an informed offer of a FAPE based on



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current information about Student, which would have been obtained from those ordered independent educational evaluations and information from New Harvest and Parents.

8. Bellflower contends it did not deny Student a FAPE after November 20, 2017, by failing to conduct the four independent educational evaluations ordered, because it did not have an obligation to assess Student pursuant to the GLASS Agreement. Bellflower argued that, because Student was parentally placed at a private school located within the geographic boundaries of Norwalk-LaMirada, that district, not Bellflower, was obliged to assess Student. Moreover, Bellflower contends it was not obliged to comply with the Order in the Decision in OAH case number 2017050338 while the appeal was pending.

9. The IDEA does not require parents to enroll children with disabilities in public schools as a prerequisite for an assessment for special education services. (34 C.F.R. § 300.134.) A school district cannot refuse parents' request for assessment of a private school student simply because parents would not enroll student first. (*Moorestown Township Board of Education v. S.D. and C.D.* (D.N.J. 2011) 57 IDELR 158.) Districts have a duty to evaluate a child and propose an IEP when parents seek assessment. (*District of Columbia v. Oliver* (D.D.C. 2014) 62 IDELR 293; *District of Columbia v. Wolfire* (D.D.C.2014) 62 IDELR 198.)

10. The district of residence and district of location each have a separate duty to assess if a child's parents approach either of those districts seeking assessment. The Federal Regulations have considered the precise situation where parents simultaneously seek assessment from both the district of location and district of residence, and found that nothing in the IDEA prohibits this practice. (71 Fed. Reg. 46593 (August 14, 2006).) The failure to appropriately assess a child is a procedural violation of the IDEA and California law that may result in a substantive denial of FAPE. (*Park v. Anaheim Union*



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*High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

11. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subds. (f) and (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1483–1484.)(superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).)

12. A decision issued by OAH is a final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) OAH orders may be enforced in a court of competent jurisdiction, or through a compliance complaint to the California Department of Education. (*Id*.; see, Cal. Code Regs., tit. 5, § 4650, subd. (a)(7)(B).) The parties have the right to appeal the decision to a state court of competent jurisdiction within 90 days of receipt of the decision, or may bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).) Unless a court of competent jurisdiction orders otherwise, an OAH decision remains in full force and effect, and is legally binding upon the parties. (Ed. Code § 56505, subd. (h), (k).)

13. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were, or could have been, raised in that action. (*Allen v. McCurry (1980)*, 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigating the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City Sch. Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 [104 S.Ct. 892, 79 L.Ed.2d 56] [federal courts use the term "issue



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preclusion" to describe the doctrine of collateral estoppel].)

14. Collateral estoppel and res judicata are judicial doctrines, but they are also applied to determinations made in administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732. A final judgment retains its collateral estoppel effect, if any, while pending appeal. *See, Tripati v. Henman* (9th Cir. 1988) 857 F.2d 1366, 1367 (stating that a pending appeal does not affect a judgment's finality for preclusion purposes). The Ninth Circuit Federal Court of Appeals has held that the benefits of giving a judgment preclusive effect pending appeal outweigh any risks of a later reversal of that judgment. *Collins v. D.R. Horton, Inc.* (9th Cir. 2007) 505 F.3d 874, 882–883, citing *Tripati*, *supra*, 857 F.2d at p. 1367.

15. Here Student proved that Bellflower denied her a FAPE through July 30, 2018, by failing to comply with the Order in OAH case number 2017050338. Bellflower's assertion that the terms of the GLASS Agreement relieved it of its obligation to assess Student, notwithstanding the Order in OAH case number 2017050338, and Parents' requests for assessments, is legally unsupported. The terms of the GLASS Agreement do not obviate Bellflower's obligations to Student under the IDEA and the Education Code. Bellflower's obligation to assess Student during the relevant statutory period in OAH case number 2017050338 was fully litigated and is not at issue here. Bellflower was ordered to immediately fund four independent educational evaluations and it failed to do so.

16. Bellflower's pending appeal did not excuse Bellflower from complying with the Order that it "shall immediately fund independent education evaluations for Student in the areas of: psychoeducation; speech and language; occupational therapy; and behavior." The pendency of the appeal was not a valid justification for Bellflower's failure



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to comply. Moreover, Student's attendance at New Harvest did not relieve Bellflower of its obligation to assess Student under the Order in OAH case number 2017050338. Student proved Bellflower was the local educational agency responsible for assessing her and offering her a FAPE. Bellflower's choice to participate in a private agreement between neighboring school districts through their SELPAs did not justify Bellflower's non-compliance with an OAH order or with the IDEA.

17. The evidence persuasively established that Bellflower did not initiate the four ordered independent educational evaluations by the time Student filed her complaint in this case. Bellflower's failure to appropriately and timely assess Student is a procedural violation that significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, because Parents did not have important current information about Student that would have been available to them if Bellflower had assessed Student, as it was ordered. Bellflower's failure to assess Student as ordered also impeded Student's right to a FAPE, because it was not possible for her IEP team to develop and offer her an appropriate FAPE since there were no recent assessment reports available to inform the team of her current needs. Consequently, Bellflower denied Student a FAPE by failing to timely conduct the four independent educational assessments ordered on November 20, 2017 in OAH case number 2017050338.

ISSUE NUMBER TWO: PARENTS' JUNE 2018 ASSESSMENT REQUEST

18. Student contends Bellflower denied her a FAPE because it did not timely and appropriately respond to Parents' June 18, 2018 request for assessments, by providing Parents with an appropriate assessment plan for a central auditory process assessment and a transition assessment, and instead inappropriately informed Parents that they should request the assessments from Norwalk-La Mirada.

19. Bellflower contends it did not deny Student a FAPE by failing to timely and



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appropriately respond to Parents' June 18, 2018 request for central auditory processing, and transition assessments because Bellflower informed Parents in writing on June 29, 2018, to contact Norwalk-LaMirada and ask it to conduct such assessments. Bellflower asserts Norwalk-LaMirada is the proper local educational agency to assess Student pursuant to the GLASS Agreement.

20. When a student is referred for special education assessment (by parent or others) the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56043, subds. (c) & (f).)

21. Prior written notice must be given when the school district proposes or refuses to initiate a change in the identification, assessment, or educational placement of a child with special needs or the provision of a FAPE. (20 U.S.C. § 1415(b)(3) & (4); 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503; Educ. Code §§ 56329 and 56506(a).)

22. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen Sch. Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) Prior written notice must be sent "a reasonable time" before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or provision of FAPE to the child. (34 C.F.R. §



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300.503(a)(1); Ed. Code, § 56500.4, subd. (a).) This is to ensure that parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect. (*Letter to Chandler,* 59 IDELR 110 (OSEP April 26, 2012).)

23. A prior written notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; (3) a description of each evaluation procedure, assessment, record, or report which is the basis of the action; (4) a statement that the parents of an individual with exceptional needs have protection under the procedural safeguards, and the means by which a copy of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance; (6) a description of the other options the IEP considered and the reasons why those options were rejected; and (7) a description of other factors relevant to the proposal or refusal of the agency. (20 U.S.C. § 1415(b)(3) and (c)(1); 34 C.F.R. § 300.503(a) and (b); Ed. Code, § 56500.4, subd. (a) and (b); see also Ed. Code, § 56500.5 [requiring "reasonable written prior notice" that a student "will be graduating from high school with a regular high school diploma . . ."].) The notice is required even if the change is being proposed by the parent. (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).) When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*C.H.*, *supra*, 606 F.3d at p. 70.)

24. On June 18, 2018, Parents requested in writing that Bellflower assess Student in the areas of central auditory processing, and transition. These areas were new areas of suspected need, and not addressed in OAH case number 2017050338. Mr. Adair responded in writing to Parents' requests and informed them that Bellflower would not conduct either the central auditory processing, or the transition assessment. He did not expressly explain that Bellflower refused to assess Student due to its reliance on the GLASS Agreement, but instead stated that Student might be entitled to receive the requested assessments from Norwalk-La Mirada because she attended a private school



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located within that district. Mr. Adair's notice further stated Bellflower would not assess Student until Parents indicated their desire to enroll her in Bellflower.

25. As established by Mr. Adair's testimony, Bellflower declined to assess Student in central auditory processing and transition in reliance on the GLASS Agreement. This reliance was misplaced, because it conflicted with Bellflower's obligation to timely assess Student under the California Education Code and the IDEA.

26. Because Parents requested the assessments after the end of the 2017-2018 school year, the 15-day period for Bellflower to provide them with an assessment plan started to run on August 20, 2018, the first day of the 2018-2019 school year. Mr. Adair responded to the request in writing, declining Parents' request well before he was required to do so. Thus, his response was timely. Mr. Adair's response that Bellflower would not conduct the requested assessments, and Norwalk-LaMirada was the proper district to do so, was incorrect, was not an appropriate response, and failed to comply with applicable law requiring the district of residence to conduct assessments requested by Parents of private school students, regardless of where the private school is located.

27. Bellflower denied Student a FAPE by materially breaching its obligations to her when it failed to appropriately respond to Parents' requests for assessments by providing them with a proposed assessment plan, indicating Student would be assessed in the areas of central auditory processing and transition. Bellflower's failure to appropriately and timely assess Student in central auditory processing and transition is a procedural violation that significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, because Parents did not have important current information about Student in those two areas that would have been available to them if Bellflower had appropriately assessed Student as they had requested. Consequently, Student prevailed on issue two by proving with a preponderance of the evidence that Bellflower denied Student a FAPE by failing to



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appropriately respond to Parents' June 18, 2018 requests for central auditory processing and transition.

### ISSUE NUMBER THREE: BELLFLOWER'S FAILURE TO TIMELY OFFER STUDENT A FAPE FOR THE 2018-2019 SCHOOL YEAR

28. Student contends Bellflower denied her a FAPE because it refused to offer her a FAPE for the 2018-2019 school year, even though Parents had requested Bellflower to do so.

29. Bellflower contends it did not deny Student a FAPE by failing to offer Student a FAPE for the 2018-2019 school year because Parents did not either enroll Student in Bellflower or indicate they wanted to enroll Student in Bellflower.

30. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to all eligible students who reside in it. States must ensure that "[a] free appropriate public education is available to all children with disability residing in the State between the ages of 3 and 21." (20 U.S.C. § 1412(a)(1)(A).) A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Developing an IEP is a necessary predicate to offering a FAPE, and the obligation to offer a FAPE also includes an obligation to develop an IEP. (Cf. *Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 238–39 [129 S.Ct. 2484, 174 L.Ed.2d 168] ("[W]hen a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.").)

31. In order to provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) The district must review the child's IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1,



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subd. (d).)

32. If parents of a private school child request an IEP for their child, the local educational agency is required to honor that request. (*Dist. of Columbia v. Vinyard* (D.D.C. 2013) 971 F.Supp.2d 103, 111; *Letter to Eig* (OSEP 2009) 52 IDELR 136 (local educational agency where student resides cannot refuse to conduct the evaluation and determine the child's eligibility for FAPE because the child attends a private school in another district).) Parents are entitled to place student in private school even though district of residence had not previously denied student a FAPE, and also seek a FAPE from the district in which parents continue to reside. (*J.S. v. Scarsdale Union Free Sch.* (S.D.N.Y. 2011) 826 F.Supp.2d 635, 665-668; 71 Fed. Reg. 46593 (August 14, 2006); *Board of Educ. of Evanston-Skokie Community Consol. Sch. Dist. 65 v. Risen* (N.D. Ill., June 25, 2013, No. 12 C 5073) 2013 WL 3224439, at 12-14; *Dist. of Columbia v. Oliver* (D.D.C., Feb. 21, 2014, No. CV 13- 00215 BAH/DAR) 2014 WL 686860, at 4 (Districts have no obligation to *provide* FAPE to parentally placed private school students with disabilities; but they do have an obligation to make FAPE *available* and cannot fulfill this duty without developing an IEP).)

33. "Parentally-placed private school children with disabilities" is a defined term that means children with disabilities enrolled by their parents in private schools or facilities. (Ed. Code, § 56170; 34 C.F.R. § 300.130.) No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. (Ed. Code, § 56174.5; 34 § 300.137(a).) Instead, parents of a child in private school have two options: (1) accept the offer of a FAPE and enroll their student in the public school, or (2) keep their child in private school and receive "proportional share" services, if any, provided to the student pursuant to 20 U.S.C. § 1412(a)(10) and 34 C.F.R. § 300.130–300.139. (*District of Columbia v. Wolfire* (D.D.C. 2014) 10 F.Supp.3d 89, 92.)



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34. An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal, written offer should be enforced rigorously and provides parents with an opportunity to accept or reject the placement offer. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. den.*, 513 U.S. 965 (1994).) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in public school is not required to receive an IEP. (See *Woods v. Northport Public Sch.* (6th Cir. 2012) 487 Fed. Appx. 968, 979 ["It was inappropriate to require [student] to re-enroll in public school in order to receive an amended IEP"…[]…"It is residency, rather than enrollment, that triggers a district's IDEA obligations."].

35. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. In *D.B. ex rel. Roberts v. Santa Monica-Malibu Unified Sch. Dist.* (9th Cir. 2015) 606 Fed. Appx. 359, 360, the school district held an IEP team meeting to determine student's placement and services for the following school year without parents, who were unavailable and who had already decided the student would not be attending a district school. The court found that the failure to include parents in the IEP team meeting was a procedural violation that denied the Student a FAPE in the following school year. ["Furthermore, even if D.B.'s parents already had decided to enroll D.B. at the Westview School, their exclusion was not permissible. See *Anchorage Sch. Dist.*, *supra*, 689 F.3d at p. 1055 ('[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency.')." *D.B. ex rel.*



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*Roberts, supra,* 606 Fed. Appx. 359 at p. 360.]

36. Parents of a child placed in private school with an existing IEP, or found eligible for special education while in private school, may choose to revoke consent in writing for the provision of special education and related services to their child. (Ed. Code, § 56346, subd. (d).) If the parents do not revoke consent in writing, the school district must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. (20 U.S.C. §§ 1412(a)(3)(A) and (a)(4), 1414(a); *Department of Educ., State of Hawaii v. M.F. ex rel. R.F.*, (D. Hawaii 2011) 840 F.Supp.2d 1214, 1228-1230.)

37. The evidence persuasively established that Parents repeatedly requested Bellflower to make an offer of a FAPE for Student, from well before the Decision in OAH case number 2017050338, and through June 18, 2018, when Parents reminded Mr. Adair in writing that they still wanted Bellflower to make an offer of a FAPE to Student. Bellflower was well aware of Parents' desire to receive an offer of a FAPE for Student. By refusing to comply with their request for an offer of a FAPE, Parents were deprived of the opportunity to participate in the decision-making process regarding the provision of FAPE to Student.

38. Bellflower argued that it was not required to develop an IEP for Student because she did not enroll in Bellflower as a prerequisite to assessments, and because Parents did not seem interested in enrolling her in Bellflower. Those arguments were not convincing, and were unsupported by any persuasive evidence or legal authority. The evidence established that 1) Student was a Bellflower resident at all applicable times and 2) Parents requested that Bellflower make an offer of FAPE for the 2018-2019 school year. Those facts triggered Bellflower's legal duty under the IDEA to develop and offer Student a FAPE for the 2018-2019 school year.

39. In reliance on the GLASS Agreement, Bellflower repeatedly erroneously



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informed Parents it had no obligation to offer Student a FAPE unless she was enrolled in Bellflower. Bellflower's statutory obligation to offer Student a FAPE was not obviated by the GLASS Agreement. Bellflower offered no valid legal authority supporting its position that a private agreement between one district and its neighboring districts (or between SELPA members of a regional SELPA organization) relating to policy eradicates or supersedes a school district's obligations under the IDEA.

40. Student proved Bellflower did not make an offer of FAPE to Student for the 2018-2019 school year, as it was obligated to do. This material violation of the IDEA significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student because Parents did not have the opportunity to evaluate an offer of FAPE from Bellflower. Also, Student's right to a FAPE was impeded because the IEP team never developed an IEP and offered her an appropriate FAPE.

## REMEDIES

1. Student prevailed on all issues. As remedies, Student requests independent educational evaluations, compensatory education, training for Bellflower staff, and reimbursement for the costs of her private school and transportation thereto. Student also seeks an order that Bellflower hold an IEP and offer Student a FAPE. District disagrees with Student's request for reimbursement because New Harvest is a private school and Christian teachings are interwoven in its curriculum.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine



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whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524, citing *Parents of Student W.*, *supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid*, *supra*, 401 F.3d at p. 524.)

3. Here, Bellflower denied Student a FAPE during the relevant statutory period, by failing to assess Student as ordered in OAH case number 2017050338, as requested by Parents in June, 2018, and by failing to offer Student a FAPE for the 2018-2019 school year. Student is, therefore, entitled to the following remedies.

4. Student did not provide expert testimony regarding Student's needs for appropriate compensatory education. However, Ms. Garcia testified that Student was functioning two years behind grade level academically, and she had difficulty with multi-tasking. Mother also testified that Student continued to struggle with processing things she reads and hears, and she needed speech therapy services. Student proved that she benefitted from one to one instruction. Thus, the evidence established that Student would benefit from an award of compensatory education.

5. The Decision in OAH case number 2017050338 ordered Bellflower to immediately fund four independent educational evaluations of Student, which Bellflower failed to do. Twenty-seven weeks remained in the 2017-2018 school year following the issuance of the Decision in OAH case number 2017050338 on November 20, 2017. There were 15 weeks in the 2018-2019 school year, from the beginning of the year through November 29, 2018, the last day of hearing in this case. That constitutes a total of 52 weeks (27 + 15=52) during the two school years (2017-2018 and 2018-2019) that Bellflower breached its duties to Student following the Decision in OAH case number



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2017050338, through the last day of hearing in this case. Ms. Garcia and Mother testified that Student made progress with one to one academic instruction. Ms. Garcia also testified that Student was functioning two years below grade level, so she clearly would receive educational benefit from compensatory education. Accordingly, an equitable remedy of one hour for each of the 52 weeks that Bellflower denied Student a FAPE as compensatory education for lost educational benefit, is reasonably calculated to provide educational benefit to Student. Student will be awarded 52 hours of specialized academic instruction to be provided by a credentialed special education teacher from a nonpublic agency of Parents' choosing, subject to Bellflower's guidelines for these services. Student shall use such compensatory education within 18 months from the date this Decision is issued.

6. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Sch. Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [ 114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the



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student had made substantial progress).)

7. Reimbursement may be reduced or denied for a variety of circumstances or if the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. v. Board of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that a parent who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement "forfeit[ed] their claim for reimbursement." In *Patricia P.* reimbursement was denied where the parent had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

8. In this case Parents acted reasonably by placing Student at New Harvest when Bellflower failed to assess and offer her a FAPE. They gave Bellflower written notice that they placed Student at New Harvest and would seek reimbursement for educationally related expenses from Bellflower. Student unquestionably received educational benefit from attending New Harvest. Evidence established that New Harvest students spend five percent of each school day on religious instruction. Consequently, Parents' tuition reimbursement from Bellflower shall be reduced by five percent of the New Harvest tuition they paid.

9. Bellflower reimbursed tuition, in compliance with the Order in OAH case number 2017050338, for the 2016-2017 school year. It did not reimburse Parents for any part of the tuition for the 2017-2018 or the 2018-2019 school years. Parents proved that they paid 435 dollars per month for Student's tuition at New Harvest for the 2017-2018 school year, and for each of September, October and November, 2018, during the 2018-2019 school year up to the last date of hearing. Therefore, Parents paid New Harvest tuition in the amount of $1,305 ($435 x 3=$1,305) for tuition for September, 2018, through November, 2018. Because five percent of the New Harvest curriculum is



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devoted to religious study, the amount of tuition to be reimbursed is reduced accordingly by 5 percent. Therefore, the tuition reimbursement for the first three months of the 2018-2019 school year is reduced by 5 percent to $1,239.75 ($1,305 x 95% = $1,239.75). Student failed to establish that she needed extended school year, so Parents will not be reimbursed for the tuition paid for 2018 summer school. Upon Parents providing proof of tuition payments to Bellflower for the 2017-2018 school year, Bellflower shall reimburse Parents 95% of regular school year tuition paid for the 2017-2018 school year, plus $1,239.75 for 95% of the first three months of the tuition payments for the 2018-2019 school year.

10. Upon Bellflower's receipt of proof of the number of days Student actually attended New Harvest in the 2017-2018 school year, Bellflower shall reimburse Parents for one round trip daily between Student's home and school, consisting of 9.58 miles, at the applicable Internal Revenue Service standard mileage rate for that time period.

11. Student established that she attended New Harvest for 56 days from the beginning of the 2018-2019 school year through November 28, 2018 (when Ms. Garcia testified at hearing). Therefore, Bellflower shall reimburse Parents for 56 daily round trips between Student's home and school, consisting of 9.58 miles, at the applicable Internal Revenue Service standard mileage rate for that time period.

12. Student also requests independent educational evaluations. An independent educational evaluation at public expense may also be awarded as an equitable remedy if necessary to grant appropriate relief to a party. (*Los Angeles Unified Sch. Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.)

13. OAH case number 2017050338 ordered Bellflower to immediately fund independent educational evaluations in the areas of psychoeducation, speech and language, occupational therapy, and behavior. Because Bellflower did not conduct these independent educational evaluations as ordered, Bellflower is ordered in this case to



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fund independent educational evaluations by providers of Parents' choosing, subject to Bellflower's guidelines for independent assessments, in the areas of psychoeducation, speech and language, occupational therapy, and behavior. Bellflower shall fund up to three hours for each independent assessor to prepare for, travel to and from, and attend an IEP meeting, telephonically or in person, to discuss their assessment reports. Bellflower shall contract with Student's assessors of choice no later than 15 days after this decision is issued.

14. Because Bellflower failed to appropriately provide Student with an assessment plan for assessments in central auditory processing and transition, Bellflower shall immediately fund independent educational evaluations in those areas by a provider chosen by Parents, subject to Bellflower's guidelines for independent assessments. Bellflower shall fund up to three hours for each independent assessor to prepare for, travel to and from, and attend an IEP meeting, telephonically or in person, to discuss their assessment reports. Bellflower shall contract with Student's assessors of choice no later than 15 days after this decision is issued.

## ORDER

1. Bellflower shall fund 52 hours of specialized academic instruction to be provided by a credentialed special education teacher from a nonpublic agency of Parents' choosing, subject to Bellflower's guidelines for these services. Student shall use such compensatory education within 18 months from the date of this Decision. Unused hours shall be forfeited.

2. Within 45 days of the date of this Order, Bellflower shall reimburse Parents $1,239.75 for 95% of tuition they paid for the portion of the 2018-2019 school year from September, 2018, through November, 2018. Additionally, according to proof of payment, Bellflower shall reimburse Parents 95% of the tuition they paid for the 2017-2018 school year, within 45 days of the date Parents provide Bellflower with such proof.



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3. Within 45 days of Bellflower's receipt of proof of the number of days Student actually attended New Harvest in the 2017-2018 school year, Bellflower shall reimburse Parents for one round trip daily between Student's home and school, consisting of 9.58 miles, at the applicable Internal Revenue Service standard mileage rate for that time period.

4. Within 45 days of the date of this Order Bellflower shall reimburse Parents for 56 daily round trips made from the beginning of the 2018-2019 school year through November 28, 2018, between Student's home and school, consisting of 9.58 miles, at the applicable Internal Revenue Service standard mileage rate for that time period.

5. Bellflower shall fund independent educational evaluations by providers of Parents' choosing, subject to Bellflower's guidelines for independent assessments, in the areas of psychoeducation, speech and language, occupational therapy, behavior, central auditory processing and transition. Bellflower shall fund up to three hours for each independent assessor to prepare for, travel to and from, and attend an IEP meeting, telephonically or in person, to discuss their assessment reports. Bellflower shall contract with Student's assessors of choice no later than 15 days after this decision is issued.

6. Bellflower shall hold an IEP team meeting to discuss the independent evaluations, develop an IEP and offer of FAPE for Student in compliance with applicable timelines unless the parties agree otherwise.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on all three issues presented.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all



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parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: January 25, 2019

/S/

CHRISTINE ARDEN

Administrative Law Judge

Office of Administrative Hearings



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